United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

852

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23975

UNITED STATES OF AMERICA,

Appellee,

v.

ROY L. THOMAS, JR.,

Appellant,

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. VENABLE
1735 K Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Appointed by this Court)

Cr. No. 1058-69

REFERENCES AND RULINGS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether an indictment for Burglary in the First Degree which fails to allege with specificity the criminal offense which defendant intended to commit upon entry describes an offense.

Whether the government's evidence proved beyond a reasonable doubt the necessary element of specific intent to sustain a conviction of Burglary in the First Degree.

Whether the trial court properly instructed the jury regarding the element of specific intent to commit a criminal offense.

STATEMENT OF THE CASE

Appellant was charged in a single court indictment with burglary in the first degree by entering the dwelling of complaintant in the District of Columbia while she and her two minor children were present in said dwelling with intent to commit a criminal offense therein.

The evidence showed that in the early morning hours of April 5, 1969, or thereabouts (Tr. p. 37) appellant partially entered the bedroom of Teresa Medley while she was watching television (Tr. p. 65). Teresa called her mother about appellant's presence in the room (Tr. p. 38) and the mother entered the room and observed appellant picking up his papers (Tr. p. 139) from the floor in front of a window through which he had partially (Tr. p. 51) protruded (Tr. 38-9). Appellant held a flashlight to secure the papers which had fallen from his pocket. Mrs. Medley pushed him all the way out of the window through which he protruded (Tr. p. 39), and received a scratch on her arm while so doing (Tr. p. 42).

Shortly after 8:30 a.m. that day, some five hours or more after the incident Mrs. Medley contacted the police (Tr. p. 44). Officer Calvin responded shortly after 9:00 a.m. (Tr. 72) and was given some small slips of paper containing names and phone numbers by Mrs. Medley (Tr. p. 72). These slips of paper had previously been found on the floor of Mrs. Medley's bedroom window (Tr. p. 72). Officer Calvin turned these papers over to Detective McCracken (Tr. p. 74,84) who also responded to Mrs. Medley's call (Tr. 79) shortly thereafter (Tr. p. 80).

Detective McCracken started calling the phone numbers on the papers and reached one Mary Grisby whose name and phone number appeared on one of

these papers (Tr. p. 86). Mary Grisby testified that she met defendant in a time of distress and as a result gave him her phone number on one of the pieces of paper found by Mrs. Medley (Tr. p. 87). As a result, a warrant was obtained and defendant was subsequently arrested at his apartment (Tr. p. 88). A lineup was held where the defendant was identified by Mrs. Medley among seven or eight other subjects (Tr. p. 89-90).

Mr. Thomas' defense was that he had been drinking with friends most of the day on April 4, 1969, the anniversary of the assassination of Rev. Martin Luther King (Tr. p. 107-108, 115-116, 123). He departed the company of his friends in the early morning hours of April 5 (Tr. p. 116). After parting company with his friends, he drove the car to the corner of Q Street, S.E. where he parked it (Tr. p. 123), and started walking, vomiting on the way (Tr. p. 123). A stranger called to Mr. Thomas and asked him to help get into the stranger's apartment as he was locked out (Tr. p. 123). Being of the good samaritan type (Tr. p. 98) Mr. Thomas agreed and was boosted to the apartment he is accused of burglarizing (Tr. 123). As he was lifted by the stranger to the window, his body fell through the window and his wallet fell out of his jumpsuit pocket spilling papers onto the floor (Tr. 123-124). As this happened, a little girl screamed as he started to pick up his papers (Tr. p. 124). Shortly thereafter a lady -- presumably Mrs. Medley -- came running into the room (Tr. p. 124). Defendant fell back to the ground and could not find the subject of his succor (Tr. p. 125).

After closing arguments by counsel and the charge by the court, the jury retired and returned a verdict of guilty (Certificate of Proceedings 12/2/69).

STATEMENT REGARDING PRIOR APPEALS

The instant proceeding has not previously been before this Court for consideration.

ARGUMENT

I
Introduction

The facts of this case demonstrate a clear situation of improper use by the Government of an unlawful indictment to wrongfully convict the appellant of criminal offense he did not commit. It seems appalling that Government's attorneys and the court below, even unintentionally, permitted this travesty of justice to occur through a chain of errors which resulted in this unhappy conclusion.

The indictment of the appellant, while undated, was filed on July 1, 1969. The single count indictment reads in full, as follows:

The Grand Jury charges:

On or about April 5, 1969, within the District of Columbia, Roy L. Thomas, Jr. entered the dwelling of Vivian M. Medley, while Threasa (sic) A. Medley, Carolyn I. Medley and Vivian M. Medley were present in the said dwelling, with intent to commit a criminal offense therein.

The indictment is signed only by the United States Attorney and by the grand jury forewoman.

The statute which the appellant is accused by this indictment of violating is D.C. Code §22-1801(a), amended in 1967 [1] to read as follows, in relevant part:

> "Whoever shall, either in the night time or in the day-time, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building with intent. . . to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, be guilty of burglary in the first degree."* * *

The evidence at trial produced by the Government showed, in summary, that Mrs. Medley and her young daughter, who was awake in her bedroom at 3:00 a.m. one morning, discovered the appellant with his head and arms on the floor and his feet on the sill of the open window. They noticed he had a small flashlight and seemed to be looking for some papers on the floor. Mrs. Medley then struggled with the appellant and pushed him out the window. Mrs. Medley waited until the next morning over five hours later, before calling the police. [2] A slip of paper on the floor, found by Mrs. Medley and given to the police led to the appellant's arrest. [3]

1/ Pub. L. 90-226, §602, 81 Stat. 736.
2/ Tr. p. 44.
3/ Tr. pp. 45, 72.

The evidence of the appellant, who testified and was supported by the testimony of two companions, showed that he was returning home in a somewhat intoxicated condition when a stranger stopped him on the street and asked for assistance in entering his locked apartment out of which he supposedly had locked himself. This stranger assisted the appellant in entering Mrs. Medley's window, where the subsequent events described above occurred.[4/] The stranger has not been discovered nor has he come forward to testify.

II.

Appellant's Substantial Rights Were Prejudiced By The Use Of An Indictment Which Did Not Specify The Crime Which He Allegedly Intended To Commit And Thus Fails To Allege An Offense

The appellant's major argument is that the language of this indictment accusing him of entering an occupied dwelling "with intent to commit a criminal offense therein" is improper under both the general principles applicable to criminal indictments and, more narrowly, under the specific rules applicable to indictments charging the offense of burglary. This defect is one that affects the substantial rights of the appellant, because the indictment fails to charge him with specific offense contrary to law. Because of the nature of this error, the appellant is permitted to attack the sufficiency of the indictment for

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4/ Tr. pp. 123-124.

the first time on appeal.[5] The record shows that no motion was made below to dismiss the indictment, either before or during the trial.

Approaching first the narrower defect in the indictment, the appellant contends that in order to charge him with the offense of burglary, when no other offense is charged in the indictment, the indictment must specify the crime which it is alleged he intended to commit upon his unlawful entry. At common law, the elements of the offense of burglary were a breaking and entering of another's dwelling house at night with intent to commit a felony therein.[6]

Most jurisdictions have changed these elements by statute,[7] but the essential requirement of a specific intent to commit a criminal offense

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5/ Compare Fed. R. Crim. Proc. Rule 12(b)(2) with Rule 34, 18 U.S.C.A. See Scarbeck v. United States, 115 U.S. App. D.C. 135, 317 F. 2d 546 (1962) at 550, note 1, cert. den., 374 U.S. 856, reh. den. 375 U.S. 874; United States v. Beard, 414 F. 2d 1014, 1017 (3rd Cir. 1969); Walker v. United States, 342 F 2d 22, 26 (5th Cir. 1965) cert. den. 382 U.S. 859.

6/ State v. Wiley, 194 A. 629 (Md. 1937) 12 C.J.S. Burglary §1(b).

7/ Usually to make it burglary when the offendor enters, without breaking, or it occurs in the daytime.

has remained.[8/] See D.C. Code §22-180(a) supra. In United States v. Jeffries, 45 F.R.D. 110 (D.C.D.C. 1968), the court was discussing whether an entry needed to be called "unlawful" in the indictment to charge the defendant with burglary. At page 112, the court said:

> "The crucial element of the offense of second degree burglary is the specific intent which impelled the entry and not the lawful or unlawful manner of entry."

The indictment in Jeffries, in fact, charged the defendant with an entry "with intent to steal property of another."[9/] This is considerably more specific than the indictment in the instant case.[10/]

In Boid v. United States, 76 U.S. App. D.C. 205, 133 F 2d 313 (1942), the court was dealing with the requirements of specifying in the

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8/ While common-law burglary encompassed only a fellonious entry to commit a felony, the D.C. Code definition broadens the element to include any "criminal offense." The case of United States v. Frank, 225 F. Supp. 573 (D.C.D.C. 1964), decided under the pre-1967 version of D.C. Code §22-1801, says, by way of dicta, that as a general rule "entry with intent to commit a misdemeanor. . . is sufficient to support a charge of housebreaking." 225 F. Supp. at 576. But the case held that an entry with intent to violate certain provisions of the Federal Communications Act, which were punishable by a prison term of less than one year or a fine not exceeding $10,000, was not housebreaking.

For the purposes of this argument, however, whether the appellant intended to commit a felony or misdemeanor is unimportant, because the indictment, unlike that in Frank, fails to specify any offense which he allegedly intended to commit.

9/ 45 F.R.D. at 112.

10/ Supra, p. 4.

indictment and proving at trial the identity of the owner and/or occupant of the building entered. The purpose of such specificity was to prevent a second prosecution for the same offense.[11] A similar purpose is served by requiring a specification of the offense intended to be committed in an indictment charging burglary. Otherwise, a defendant could be retried for the same offense on the theory that he intended to commit a crime other than that shown at the first trial.

The commentaries on criminal law support this necessity of the element of specific intent in the crime of burglary.

> "The breaking and entering of the dwelling house must be with the intent to commit a felony therein. In the absence of such intent, the entry of the defendant is not burglary, and may be merely a civil trespass.[12]
>
> To constitute burglary at common law or under the statutes, defendant must have entered or broke and entered with the requisite intent, and the mere breaking and entering is not of itself burglary.[13]"

In accordance with general principles of criminal pleading[14] an indictment charging burglary must specify the particular offense which the

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11/ 76 U.S. App. D.C. at 206.

12/ 2 Wharton Criminal Law and Procedure, 26-27 (1957).

13/ 12 C.J.S. Burglary §2.

14/ Discussed infra pp. 11, 12

defendant allegedly intended to commit when he entered.

> "It is not enough to allege generally an intent to commit "a felony" or "an offense," but it is necessary, in order that the charge may be certain, to state the particular felony or other offense intended.15/"

A recent case in a neighboring jurisdiction is factually almost on all fours with the instant case, and the holding and reasoning of the case are especially pertinent here. In Taylor v. Commonwealth, 207 Va. 326, 150 S.E. 2d 135 (1966), the defendant was charged in a multi-count indictment with burglary, all counts arising out of a single incident. The Virginia burglary statutes retain as an essential element that the entry be made with intent to commit a criminal offense.16/

Some of the counts of the indictment specified the crimes the defendant intended to commit, but one count charged him with breaking and entering:

> ". . . with intent then and there in said dwelling house, feloniously and burglariously to commit a felony.17/"

15/ 12 C.J.S. Burglary §32(b). In a few states the indictment must also set forth such elements of the intended felony as would be necessary in an indictment for such an offense. See State v. Allen, 119 S.E. 504, 186 N.C. 302 (1923).

16/ Va. Code 1950 §§18.1-86, 18.1-88, 18.1-89.

17/ 150 S.E. 2d at 140.

The defendant was convicted on this count alone. As to the other counts, either they were dismissed before trial or the defendant was acquitted. The court said that this count of the indictment was defective because:

> "The averment wholly fails to specify the offense or felony which it alleges he intended to commit. Specific intent is an essential element of burglary (citation omitted). It is elementary that a defendant is entitled to be apprised of the offense which he is required to answer." (Citations omitted.)18/

This defect in the indictment is not a mere technical violation, but it impairs certain constitutionally guaranteed rights of a criminal defendant which are fundamental parts of Anglo-American criminal jurisprudence. The Fifth Amendment to the Constitution provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." 19/

And the Sixth Amendment provides that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."20/

18/ Id. at 140.

19/ U.S. Const. Amend. V. Under the Federal Rules, indictments are now the exclusive means of accusing a defendant. Fed. R. Cum.Proc. Rule 7, 18 U.S.C.A. See Gaither v. United States, 413 F. 2d 1061, U.S. App. D.C. (1969), at 1065, note 1.

20/ U.S. Const. Amend. VI.

Two recent cases, Russell v. United States, 369 U.S. 749 (1962) and Gaither v. United States, ____U.S. App. D.C.____, 413 F. 2d 1061 (1969), discuss the policy underlying the required use of indictments and the rules for measuring the sufficiency of an indictment. Some of these considerations have already been mentioned in the previous discussion of the necessary elements of a burglary indictment.[21] In the Gaither case, the court said:

> "The indictment as a charging instrument has been recognized to have two chief purposes -- first to apprise the accused of the charges against him, so that he may adequately prepare his defense, and second to describe the crime with which he is charged with sufficient specificity to enable him to protect against future jeopardy for the same offense."[22]

Neither of these purposes is served by the form of indictment used in this case.

First, while the indictment is specific as to time, place and occupancy of the building,[23] it is not specific as to the crime intended to be committed. Such specific intent is an essential element of the offense of burglary.[24] Under such an indictment, a defendant would not be able to protect himself from being tried again for the same offense. In this case, no direct evidence of intent was available to the government. In fact, unlike the situation in an

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21/ Supra, pp. 10, 11 .
22/ 413 F. 2d at 1066, citing Russell v. United States, 369 U.S. at 763-764.
23/ Cf. Boid v. United States, supra, note 11.
24/ Supra, pp.____.

ordinary, garden-variety burglary case, the defendant is charged with another crime in addition to burglary. Proof of the other crime can be considered as evidence of the specific intent to commit burglary.[25/] But with an indictment drawn as the one in this case, the Government could produce evidence of, for example, an intent to commit larceny. If that were unsuccessful, the defendant could be reindicted under the same form of indictment, or even one specifying the crime intended to be committed. Then the Government could try the case on the theory the defendant intended to commit robbery, or rape or whatever. Such a procedure violates the fundamental policy of the double jeopardy clause of the constitution.[26/]

But the much more fundamental flaw in this indictment is its failure to specify the crime which the appellant must prepare to answer. The Russell case, supra, is a case where the court held the indictment insufficient because it was not specific enough. In that case, the defendant was convicted under 2 U.S.C. §192 of failing to answer questions of a congressional committee. The statute declared it to be a misdeameanor to refuse to answer "any question pertinent to the question under inquiry." The indictment only recited the words of the statute, and did not identify the "question under inquiry." [27/]

25/ See Stewart v. United States, 116 U.S. App. D.C. 411, 324 F. 2d 443 (1963).

26/ U.S. Const. Amend V. A possible counterargument, that such a broadly drawn indictment would better protect the appellant from double jeopardy misses the point. As long as the government doesn't present the same evidence twice, nor vary its proof from the indictment's accusation, it could proceed.

27/ 369 U.S. at 752.

First, the court held that it was not enough to recite the words of the statute in the indictment. The court said, at 369 U.S. 764:

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."

In so holding, the court cited and quoted supporting language from United States v. Cruikshank, 92 U.S. 542 (1876), United States v. Simmons, 96 U.S. 360 (1878), United States, v. Carll, 105 U.S. 611 (1882) and United States v. Hess, 124 U.S. 483 (1888). Such a recital of the statute is precisely that used in the indictment herein.[28/] The vice of such a form is its unfairness to the accused arising out of his uncertainty as to the nature of the accusation against him. As the court said in Russell:

> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." * * *

This is precisely the evil that occurred in this case. The appellant was tried on a burglary charge without having the vaguest notion what evidence the Government might introduce to prove specific intent. The court below

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28/ Supra, pp. 4.

permitted the Government's attorney to make unsubstantiated inferences as to specific intent drawn solely from the fact of entry, and the possession of a small pocket flashlight. 29/

The Gaither case, supra, recognizes that another of the purposes of the indictment is to ensure that a criminal defendant is accused of a crime only by a group of ordinary citizens and is not subject to the oppression and abusive practices of prosecutors and judges. 30/ The indictment in this case gives the prosecutor extremely broad latitude in determining the nature of the proof he will introduce at trial. In effect, he is permitted by such an indictment to accuse the defendant, to the exclusion of the grand jury. In Russell, the court stated the principle in this manner:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive a defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 31/

Applying this principle to the facts of this case, the Government's attorney is permitted, compelled even, by the indictment to select one or more of many crimes he can attempt to prove the appellant intended to commit when he

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29/ Tr. pp. 161-162; 163-169; 176-178.

30/ ____ U.S. App. D.C. at ____; 413 F. 2d at 1066.

31/ 369 U.S. at 770. See also Stirone v. United States, 361 U.S. 212, 218 (1960).

entered Mrs. Medley's apartment. Because this has in fact occurred, the appellant has been denied his constitutionally guaranteed right to be accused only by his fellow citizens.[32/]

An "important corollary purpose" served by requiring an indictment to be specific in charging a criminal offense is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."[33/] This important purpose is not served by the indictment in this case, when the allegation does not specify an intent to commit a particular crime when entry is made, a necessary element of the offense of burglary. The trial judge is unable to rule on the relevance of any evidence of specific intent the Government might introduce, when no crime is specified. And an appellate court would be unable to determine the basis for the conviction and could not effectively review it.

The above analysis shows conclusively that substantial rights of the appellant have been prejudiced by the defective indictment. For these reasons, his conviction for burglary in the first degree must be reversed.

32/ See also Gaither v. United States, supra, 413 F. 2d at 1067.

33/ Russell v. United States, supra, 369 U.S. at 768 quoting United States v. Cruinkshank, 92 U.S. 542 (1876). See also cases cited in Russell in footnote 15, 369 U.S. at 768.

III.

The Government's Evidence Failed To Prove Beyond A Reasonable Doubt The Necessary Element Of Specific Intent to Sustain The Burglary Conviction

The Government's evidence of the appellant's alleged specific intent "to commit a criminal offense therein" failed to meet its necessary burden of proof beyond a reasonable doubt. As in every criminal case, the Government has the burden of proving, by its evidence, every essential element of the crime of burglary. Lawson v. United States, 101 U.S. App. D.C. 332, 248 F. 2d 654 (1957) cert. den. 355 U.S. 963. And its burden is to prove the elements beyond a reasonable doubt, to introduce proof to a moral certainty. Butler v. United States, 115 U.S. App. D.C. 108, 317 F. 2d, 171 (1963); United States v. Naples, 192 F. Supp. 23 (D.C.D.C. 1961) rev'd on other grounds 113 U.S. App. D.C. 281, 307 F. 2d 618.

The Taylor case, relied on above by the appellant in his discussion of the requisites for an indictment for burglary, also contains an extensive discussion of the necessity of independent proof of specific intent to sustain a burglary conviction. Because there was no direct evidence of intent (such as proof of the commission of another crime after entry), the prosecution attempted to prove intent by an inference drawn from the fact of entry. The court rejected the argument in these terms:

> "We cannot deduce just what the defendant intended when he entered the (dwelling) other than from his statements

> and acts. It is possible that it may have been for a felonious purpose; but possibility is not sufficient proof for criminal conviction. The burden was on the Commonwealth to establish all facts necessary for conviction beyond a reasonable doubt."
> * * *
>
> "The evidence is sufficient to show that the defendant broke and entered the dwelling house in the nighttime, but "It is the law in this jurisdiction that where a statute makes an offense consist of an act combined with a particular intent, such intent is as necessary to be proved as the act itself, and it is necessary for the intent to be established as a matter of fact before a conviction can be had. Surmise and speculation as to the existence of the intent are not sufficient and 'no intent in law or mere legal presumption, differing from the intention in fact, can be allowed to supply the place of the latter.'" (Citations omitted).[34]

This rule on proof of specific intent has two legs. First, the requisite specific intent may not be presumed from proof of the commission of the act, as is the general rule in criminal cases. This general rule is usually framed as "The law presumes every man intends the natural and probable consequences of his acts." Liggins v. United States, 54 App. D.C. 302, 29 F. 881 (1924). Moorman v. United States, 389 F. 2d 27 (5th Cir. 1968). But when a specific intent is an element of a crime, as it is in burglary, the rule is that this presumption is not available to prove the intent. Benchwick v. United States, 297 F 2d 330 (9th Cir. 1961) at 333, note; Windisch v. United States, 295 F. 2d 531 (5th Cir. 1961) at 532.[35]

34/ 150 S.E. 2d at 141. See also 22 C.J.S. Criminal Law §32.

35/ Cf. Morissette v. United States, 342 U.S. 246 (1952).

The other leg of this rule is that the prosecution is permitted to prove specific intent by independent proof. Because intent cannot be proved directly, circumstantial evidence is admissible to prove intent. United States ex rel. Vraniak v. Randolph, 261 F. 2d 234 (7th Cir. 1958). Irmholte v. United States, 226 F. 2d 585 (8th Cir. 1955).[36/]

Applying these principles to this case, the Government's attempt to use proof of the fact of unlawful entry to provide proof of the requisite specific intent is improper and was prejudicial error.[37/] The only independent circumstantial proof of intent was the fact that the defendant had in his possession and was using a small red and white pocket flashlight to look for his wallet and some papers he dropped on the floor when he fell through the window.[38/] But the inference of intent from this fact is not nearly strong enough to meet the Government's burden of proof beyond a reasonable doubt.

The trial court therefore erred in not granting the appellant's motion for a judgment of acquittal at the close of the Government's evidence.[39/]

36/ For a general discussion of this subject see 22 C.J.S. Criminal Law §32.
37/ Supra, note 29.
38/ Tr. pp. 38-41, 68, 124, 139-143.
39/ Tr. pp. 100-101.

IV.

The Trial Court Erred In Instructing The Jury On The Essential Element Of Specific Intent To Sustain A Conviction of Burglary In The First Degree

The foregoing discussion on the nature and proof of specific intent necessary to support a conviction of burglary shows conclusively that the court below erred in its instructions to the jury on specific intent. These instructions are found at pages 186-187 of the transcript.

In determining the intent with which the defendant entered, if he did so, you may consider all the facts and circumstances in evidence, including the manner of entry and the acts and events which occurred in the premises subsequent to entry.

Now, intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means that the thing was done consciously and voluntarily and not inadvertently or accidentally.

Some criminal offenses require only a general intent. Where this is so and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

Other offenses, such as first-degree burglary, require a specific intent.

Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts.

A person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with

specific intent.

Intent ordinarily can not be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind.

But you may infer as to the defendant's intent from the surrounding circumstances. You may consider any statement made, an act done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done and knowingly omitted.

An act is done knowingly if it is done voluntarily and purposely, and not because of mistake, inadvertence or accident.

An act is done willfully if it is done knowingly, intentionally and deliberately. (Emphasis added.)

The italicized portions of these instructions are erroneous, because they are appropriate only for an instruction on general criminal intent. To permit such language in these instructions allowed the jury erroneously to utilize a presumption of specific intent to commit a criminal offense from the commission of an unlawful act, the entry. This was prejudicial error and is grounds for a reversal of the conviction. 40/

40/ The court's proposed instructions on specific intent were objected to by defense counsel. Tr. p. 105.

V.

Conclusion

The errors in the appellant's indictment and trial for the offense of burglary in the first degree are each in and of themselves grounds for outright reversal of the conviction. The appellant prays this court reverse the judgment of conviction of burglary in the first degree, dismiss the indictment and order his release from the House of Correction. 41/

Respectfully submitted,

David C. Venable
1735 K Street, N. W.
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

41/ The trial judge sentenced the appellant after his conviction to a prison term of one to four years. The statutory minimum under D. C. Code §22-1801(a) is five years. However, if after reversal of this conviction the appellant is reindicted, retried and reconvicted, the rule of North Carolina v. Pearce, 395 U. S. 656 (1969) would govern. That case held that a defendant could not be given a greater sentence on retrial except on the basis of affirmative conduct occurring since the previous sentending: 395 U. S. at 726.